89- 1396

Supreme Court, U.S.
FILED
FEB 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1989

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

v.

WILLIAM DAVID EVANS,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is a railroad employee's action which alleges employment discrimination in violation of California Government Code Sections 12900 et. seq., but which, in fact, is an action for wrongful employment termination, preempted by the Railway Labor Act?

2. Will the intent of Congress in enacting the Railway Labor Act be frustrated by the California Court of Appeal decision which permits the Act's mandatory arbitration procedures to be evaded?

LIST OF PARTIES

1. William David Evans;

2. Southern Pacific Transportation Company, a subsidiary of Anschutz Corporation.

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CITATIONS TO OPINION BELOW

1. The Minute Order of the Superior Court for the County of Los Angeles granting SOUTHERN PACIFIC TRANSPORTATION COMPANY' Motion for Summary Judgment. A copy of this Minute Order is included in Appendix A.

2. The opinion of the California Court of Appeal reversing the trial court's ruling is set forth in *Evans v. Southern Pacific Transportation Co.* (1989) 213 Cal.App.3d 1378, 262 Cal.Rptr. 416. A copy of this opinion is included in Appendix B.

3. Order of the California Supreme Court dated November 30, 1989 denying SOUTHERN PACIFIC TRANSPORTATION

COMPANY's Petition for hearing. A copy of the Order is included in Appendix C.

JURISDICTION

This Petition for a Writ of Certiorari is based upon the Railway Labor Act's preemption provisions set forth in 45 U.S.C. Section 151 et. seq.

The present action arises out of a suit filed in the Superior Court for the County of Los Angeles against petitioner SOUTHERN PACIFIC TRANSPORTATION COMPANY (hereinafter "Southern Pacific") by a railroad employee, plaintiff WILLIAM DAVID EVANS (hereinafter "plaintiff"). Plaintiff alleged employment discrimination based on race and/or physical handicap under California Government Code Sections 12900 et. seq.

The issue of preemption was timely raised in the trial court by a motion for summary judgment. On December 31, 1987, the trial court ruled that the plaintiff's Complaint was preempted by the Railway Labor Act, 45 U.S.C. Section 151 et seq.

The plaintiff then appealed to the California Court of Appeal. That court reversed the trial court, holding that the plaintiff's Complaint was not preempted remanding the case for trial.

SOUTHERN PACIFIC then petitioned the California Supreme Court for a review of the Court of Appeal's decision. That petition was denied on November 30, 1989.

The jurisdiction of the United States Supreme Court to review the decision of the Supreme Court of the State of California is conferred by 28 U.S.C. Section 1257(a). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment of a state court: *Florida v. Meyers* (1984) 466 U.S. 360, 104 S.Ct. 1852, 80 L.Ed.2d 381; *Bullington v. Missouri* (1981) 451 U.S. 430, 101 S.Ct.

1852, 68 L.Ed.2d 270; *New York Times Co. v. Jascalevich* (1978) 439 U.S. 1331, 99 S.Ct. 6, 58 L.Ed.2d 38; *Abood v. Detroit Board of Education* (1977) 431 U.S. 209, 97 S.Ct. 1782, 42 L.Ed.2d 261.

Although the California Court of Appeal remanded the case for trial, its decision on the federal question of preemption under the Railway Labor Act is reviewable by the United States Supreme Court. The present issue involves an important federal question regarding the viability and applicability of the preemption provisions of the Railway Labor Act. To allow the California Court of Appeal's decision to stand would seriously erode national policy under the Railway Labor Act. Jurisdiction is clearly available to this Court on these grounds. *Southland Corporation v. Keating* (1984) 465 U.S. 1, 1045 S.Ct. 852, 79 L.Ed.2d 11; *Cox Broadcasting Corporation v. Cohn* (1975) 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328; *Local No. 438 Construction & General Laborer's Union v. Curry* (1963) 371 U.S. 542, 83 S.Ct. 531, 9 L.Ed.2d 514.

STATUTORY PROVISIONS

The Railway Labor Act, 45 U.S.C. Section 151 et. seq. specifically, 45 U.S.C. Section 153 1st (i) provides:

> "The disputes between an employee or a group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this matter, the disputes may be referred by petition of the parties or by either party to the appropriate division of the

Adjustment Board with a full statement of facts and supporting data bearing upon the dispute.

(2d) Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board."

California Government Code Section 12940 provides in part:

"It shall be unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge such person from employment or from a training program leading to employment, or to discriminate against such person in compensation or in terms, conditions or privileges of employment."

STATEMENT OF THE CASE

Plaintiff is an employee of SOUTHERN PACIFIC. At all relevant times, he has also been a member of the

International Brotherhood of Electrical Workers (hereinafter "IBEW"). Prior to the commencement of any litigation in this matter, the IBEW had signed a collective bargaining agreement with SOUTHERN PACIFIC setting forth certain rules, regulations and procedures regarding the resolution of employment disputes.

On June 27, 1980, plaintiff allegedly received physical injuries while acting in the course of his employment with the SOUTHERN PACIFIC. A short time later, he returned to work and on April 5, 1983, filed a Complaint against SOUTHERN PACIFIC for his personal injuries (Los Angeles Superior Court Case No. C 448 486).

On August 11, 1983, plaintiff was charged with violating Rule G of the employment rules of SOUTHERN PACIFIC. Rule G provides that an employee may not have alcohol in his or her system while subject to duty.

Pursuant to the regulations and procedures for resolution of employment disputes which are set forth in the RLA and the IBEW/SOUTHERN PACIFIC collective bargaining agreement, a hearing was held to determine the validity of the charge. Plaintiff was represented by members of the IBEW at the hearing. As a result of the hearing, plaintiff was found to have violated Rule G and was discharged from his employment. Pursuant to the collective bargaining agreement procedures, he filed an Appeal and was subsequently reinstated on a leniency basis approximately 21 months later.

On September 17, 1984, plaintiff filed a Complaint (Los Angeles Superior Court Case No. C 514091) alleging that he was discriminated against on the basis of race and/or physical handicap. The basis for this Complaint was that he was discharged from his employment with SOUTHERN PACIFIC for violating Rule G.

On December 31, 1987, SOUTHERN PACIFIC moved for summary judgment or, alternatively, for summary adjudication of issues on the ground that plaintiff's action was in fact an action for employment termination and as such was preempted by the Railway Labor Act (hereinafter "RLA"), 45 U.S.C. Section 151 et. seq.

On December 31, 1987, SOUTHERN PACIFIC's Motion for Summary Judgment was granted. Plaintiff filed a Motion for Reconsideration on January 8, 1988 which was denied on January 29, 1988.

Plaintiff filed a Notice of Appeal on March 2, 1988 appealing the summary judgment and the order requiring him to pay costs.

On September 15, 1989, the California Court of Appeal filed its order reversing the judgment and dismissing the appeal from the order awarding costs.

On October 24, 1989, SOUTHERN PACIFIC filed a timely Petition for Review of the Decision of the Court of Appeal to the California Supreme Court.

On November 30, 1989 the California Supreme Court filed its order denying a hearing on SOUTHERN PACIFIC's Petition.

ARGUMENT

1. The Railway Labor Act Expressly Provides For An Administrative Determination Of Disputes Growing Out Of Grievance Procedures.

The RLA expressly provides for the administrative determination of disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including the cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." 45 U.S.C. §153 First (i).

It is well established that these procedures are compulsory and exclusive of judicial proceedings in any dispute subject to the RLA. *Andrews v. Louisville & Nashville Railroad Co.* (1972) 406 U.S. 320, 322-326, 92 S.Ct. 1562, 1564-1566, 32 L.Ed.2d 95; *Magnuson v. Burlington Northern, Inc.* (9th Cir. 1978) 576 F.2d 1367, 1369-1370, *cert. denied* 439 U.S. 930, 99 S.Ct. 318, 58 L.Ed.2d 323.

2. The RLA Created A Comprehensive Exclusive Arbitration Procedure Founded On Congress' Intent To Significantly Limit An Employee's Right To Resort To State Or Federal Courts In An Employment Dispute.

In reversing the trial court's ruling, the California Court of Appeal relied on *Alexander v. Gardner-Denver Co.* (1978) 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 which involved the National Labor Relations Act (hereinafter "NLRA"), not the RLA. By relying on this case, the California Court of Appeal did not take into account the long line of authority holding that the scope of preemption under the RLA is more expansive than under the NRLA.

The RLA specifically provides for a comprehensive grievance mechanism to arbitrate any grievance arising out of the collective bargaining agreement and furthermore makes arbitration the exclusive remedy for such grievances. As the court stated in *Jackson v. Consolidated Railway Corp.* (7th Cir. 1983) 717 F.2d 1045, *cert. denied* 465 U.S. 1007, 104 S.Ct. 1000, 79 L.Ed.2d 233:

> "It follows from this difference that a state claim is more likely to impinge on an area of exclusive administrative jurisdiction under the RLA than under the NRLA." 717 F.2d at 1052.

The NRLA does not have such an arbitration system. In this respect, the RLA is distinctive and unique. The RLA provision for mandatory administrative processing of minor disputes is part of a mechanism which is designed to serve the stated purposes of the Act by avoiding interruption to commerce and to provide for prompt settements of disputes growing out of grievances. 45 U.S.C. Section 151a.

The purpose of the act is to minimize interruptions in the nation's vital transportation services by labor disputes and to

provide for an orderly settlement of all disputes growing out of grievance procedures. There is no similar perceived need for swift, efficient determination of minor disputes associated with the NRLA.

In *Peterson v. Airline Pilots Assoc., Int'l.* (4th Cir. 1985) 759 F.2d 1161, the court expounded on the preemption issue comparing the RLA with the NRLA. It held that the scope of preemption by the RLA was more expansive than under the NRLA:

> "Preemption under the RLA has followed a similar tack, but a more stringent pattern of judicial deference has emerged. The scheme of remedies and procedures carefully crafted in the RLA has long been interpreted as evidence of congressional intent significantly to limit an aggrieved employee's right to resort to state law as an alternative remedy for wrongful discharge. *See, Andrews v. Louisville & Nashville Railroad Co.* (1972) 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95. Garden variety wrongful discharge actions, so called 'minor disputes' involving rights under the collective bargaining agreement, ordinarily are subject to the mandatory arbitration procedure provided in 45 U.S.C. Section 153 First (i) and are routinely held to be within the exclusive jurisdiction of the arbitral authority created by statute. [Citations.] As the Supreme Court explained in *Union Pacific Railroad v. Sheehan*, 439 U.S. 89, 94, 99 S.Ct. 399, 402, 58 L.Ed.2d 354 (1978) 'Congress considered it essential to keep the so called 'minor' disputes within the Adjustment Board and out of the courts.' [Citations.] *Unlike preemption under the NRLA, the preemption of state law claims under*

> *the RLA has been more complete.* [Citations.]" 759 F.2d at 1168-1169. (Emphasis added.)

The courts have clearly recognized that the terms, purposes and legislative history of the RLA demonstrate Congress' endeavor to promote stability in labor-management relations in the railroad industry. In making this determination, the courts have ruled that actions with the potential for interference with this federal regulatory scheme will be preempted. As the undisputed facts presented to the trial court demonstrated, the present action was clearly a minor dispute and therefore preempted under the RLA.

3. Claims For Wrongful Employment Termination Are Preempted By The RLA.

In *Andrews v. Louisville National Railroad Co.* (1972) 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95, the Court ruled that actions for wrongful discharge by railroad employees are preempted by the RLA. The Court noted that:

> "*[T]he only source of petitioner's right not to be discharged*, and therefore to treat an alleged discharge as a 'wrongful ' one that entitled him to damages, *is the collective bargaining agreement* between the employer and the union." 406 U.S. at 324, 92 S.Ct. at 1565, 32 L.Ed.2d at 99. (Emphasis added.)

In *DeTomaso v. Pan American World Airways, Inc.*, (1987) 43 Cal.3d 517, 235 Cal.Rptr. 292 *cert. denied* 484 U.S. 829, 108 S.Ct. 100, 98 L.Ed.2d 60, the California Supreme Court ruled that an airline employee's state claims against his employer for defamation and intentional infliction of emotional distress were preempted by the RLA. The plaintiff, DeTomaso, an employee of defendant Pan Am was incorrectly accused of theft. Pan Am had suspected that the employee had improperly obtained discarded cargo which

the employee had purchased from salvage. Pursuant to the RLA, Pan Am conducted an investigation. The meeting was attended by Pan Am management personnel, the employee and his union representative. The meeting was a "customary part of the pre-termination procedures." 43 Cal.3d at 522, 235 Cal.Rptr. at 294. Following the meeting, DeTomaso was discharged. He filed a grievance, it was denied and he appealed to the Western Regional Field Board of Adjustment.

Before he filed the appeal and before his grievance was settled, DeTomaso filed a civil action seeking damages against Pan Am for defamation and for negligent intentional infliction of emotional distress. A jury trial was held and a divided jury awarded DeTomaso both general and punitive damages. Pan Am moved for judgment notwithstanding the verdict, or in the alternative, a new trial. The court denied the motion for a new trial subject to the condition that DeTomaso agree to accept a remittitur. He refused and appealed. Pan Am cross-appealed arguing that the RLA preempted the plaintiff's state tort claims. The California Supreme Court stated:

> "Andrews teaches that *one must look to the substance of the claim, not its characterization*, to determine whether an action is preempted. This is so even where the alleged tort is for other than wrongful discharge." 43 Cal.3d at 526, 235 Cal.Rptr. at 297. (Emphasis added.)

The court then reviewed the case *Magnuson v. Burlington Northern, Inc.* (9th Cir. 1978) 576 F.2d 1367, *cert. denied* 439 U.S. 930, 99 S.Ct. 318, 58 L.Ed.2d 323. In that case, the employee, a train dispatcher, was on duty when a fatal accident occurred. The railroad conducted an investigation and hearing, as required by the collective bargaining agreement. The employee was found responsible for the

accident and was thus discharged. He filed an action seeking damages for intentional infliction of emotional distress based upon the railroad's alleged conspiracy to cover up the negligence of its supervisors by making the employee a scapegoat.

The *Magnuson* court held that to determine whether a purported tort claim is in substance a minor dispute, the court should examine whether the conduct complained of is "arguably governed by the collective bargaining agreement or has a 'not obviously insubstantial' relationship to the labor contract." 576 F.2d at 1369-1370. Upon such an examination, the *Magnuson* court ruled that the employee's action for emotional distress was preempted.

> "All the damages which he [the employee] claims to have suffered flowed from his wrongful dismissal from his employment. *The alleged evil motivation of the defendants would have caused him no legal injury if he had either not been discharged or if his discharge was not wrongful*.... His emotional distress was an incident of the wrongful discharge, rather than the result of an alleged conspiracy.
>
> . . . *Artful pleading cannot conceal the reality that the gravaman of the complaint is wrongful discharge* . . .
>
> Apart from the wrongful discharge aspect of the case, *the alleged actions of the defendants of which Magnuson complains involve abuse of the investigatory process and the alleged presentation of false or misleading evidence at the hearing that led to his discharge*. Both the investigation requirement and the fair hearing right are products of a collective bargaining agreement. Under

> Article 24 of the labor contract between Burlington and the American Train Dispatchers' Association, a train dispatcher cannot be disciplined 'without proper investigation.' . . . All of the alleged malfeasance of the railroad employee is thus 'arguably' governed by the collective bargaining agreement or has a 'not obviously insubstantial' relationship to the labor contract. Under the circumstances, the controversy is a minor dispute within the exclusive province of the grievance mechanism established by the RLA." (emphasis added) 576 F.2d at 1369-1370.

In the instant case, the undisputed facts establish a situation virtually identical to the factual situation presented to the *Magnuson* court. The undisputed facts reveal that the basis of plaintiff's allegation of employment discrimination is the fact that his employment with SOUTHERN PACIFIC was terminated because he had violated Rule G. Plaintiff presented *no evidence* to dispute this fact.

Furthermore, the undisputed facts reveal that no claim would have been made by the plaintiff had it not been for the fact that he was discharged for violating Rule G. As in the *Magnuson* case, the actions of which the plaintiff complains involve abuse of the investigatory process and the alleged presentation of misleading evidence at the hearing that led to this discharge. As did the defendant in the *Magnuson* case, SOUTHERN PACIFIC has provided undisputed evidence that the investigatory procedures and the right to a fair hearing are part of the collective bargaining agreement between the plaintiff's union and SOUTHERN PACIFIC. All of the malfeasance alleged by plaintiff was thus governed by the collective bargaining agreement and under the circumstances, the controversy is a minor dispute within the

exclusive province of the grievance mechanism established by the RLA.

The California Court of Appeal has now ruled that a clever attorney can avoid preemption and thus subvert Congress' intent in enacting the RLA to have employee-employer disputes resolved by arbitration. Such an attorney may now circumvent the RLA by merely alleging, not that the employee had been wrongfully terminated, but that the employee was subjected to discrimination proscribed by California Government Code §12900 et. seq. It is submitted that permitting this to become the law will destroy the system Congress created for the swift, efficient resolution of minor disputes and will imperil the transportation system of this country.

4. The California Court of Appeal Has Failed to Follow Substantial Authority That State Claims, Including Discrimination Claims, Are Preempted.

In reversing the trial court's decision, the California Court of Appeal is in opposition to the numerous cases which have held a variety of state claims to be "in essence and substance" employment grievances and therefore preempted by the RLA. See *McCall v. Chesapeake & Ohio Railway Co.* (6th Cir. 1988) 844 F.2d 294 (suit under Michigan Handicappers' Civil Rights Act preempted); *Leu v. Norfolk & Western Railway Co.* (7th Cir. 1987) 820 F.2d 825 (allegations of fraud and conversion); *Mayon v.Southern Pacific Transportation Co.* (5th Cir. 1986) 805 F.2d 1250 (wrongful discharge); *Stephens v. Norfolk & Western Railway Co.* (6th Cir. 1986) 792 F.2d 576, *modified* 811 F.2d 286 (suit under Michigan Handicappers' Civil Rights Act preempted); *Lewy v. Southern Pacific Transportation Co.* (9th Cir. 1986) 799 F.2d 1281 (claims arising from

employment discharge); *Graf v. Elgin, Joliet & Eastern Railway Co.* (7th Cir. 1986) 790 F.2d 1341 (wrongful discharge for filing FELA claim); *Myron v. Consolidated Rail Corp.* (2d Cir. 1985) 752 F.2d 50 (discharge for disloyalty); *Minehart v. Louisville & Nashville Railroad* (6th Cir. 1984) 731 F.2d 342 (retaliatory discharge); *Landfried v. Terminal Railroad Association of St. Louis* (8th Cir. 1983) 721 F.2d 254 (retailatory discharge for filing FELA claim); *Jackson v. Consolidated Rail Corp.* (7th Cir. 1983) 717 F.2d 1045 (harassment and intentional infliction of emotional distress); *Choate v. Louisville & Nashville Railroad Co.* (7th Cir. 1983) 715 F.2d 369 (intentional and reckless infliction of emotional distress); *Beers v. Southern Pacific Transportation Co.* (9th Cir. 1983) 703 F.2d 425 (same); *Schroeder v. Trans World Airlines, Inc.* (9th Cir. 1983) 702 F.2d 189 (wrongful demotion); *Brown v. American Airlines, Inc.* (5th Cir. 1979) 593 F.2d 652 (breach of alleged settlement agreement); *Magnuson v. Burlington Northern, Inc.* (9th Cir. 1978) 576 F.2d 1367 *cert. denied* 439 U.S. 930, 99 S.Ct. 318, 58 L.Ed.2d 323 (intentional infliction of emotional distress); *De La Rosa Sanchez v. Eastern Airlines, Inc.* (1st Cir. 1978) 574 F.2d 29 (malicious deprivation of pension benefits); *Bernhardt v. American Airlines, Inc.* (9th Cir. 1975) 511 F.2d 1219 (conspiracy and civil rights violation); *Samczyk v. Chesapeake & Ohio Railway Co.* (E.D. Mich. 1987) 669 F.Supp. 156 (suit under Michigan Handicappers' Civil Rights Act); *Gregory v. Burlington Northern Railroad Co.* (D. Minn. 1986) 638 F.Supp. 538 (wrongful discharge); *Odom v. Terminal Railroad Association of St. Louis* (S.D. Ill. 1985) 607 F.Supp. 724 (retaliatory discharge); *Pitts v. National Railroad Passenger Corp.* (N.D. Ill. 1985) 603 F.Supp. 1509 (allegations that management personnel plotted to subvert system of fair disciplinary hearings); *Scales v. National Railroad Passenger Corp.* (E.D. Pa.

1984) 634 F.Supp. 1 (intentional and negligent infliction of emotional distress arising out of disciplinary proceedings); *Gray v. Cheesie System* (D. Md. 1984) 588 F.Supp. 1334 (intentional interference with contractual relations); *Schwadron v. Trans World Airlines, Inc.* (W.D. Pa. 1984) 585 F.Supp. 1371 (negligent misrepresentation); *Salcedo v. Norfolk & Western Railroad Co.* (E.D. Mich. 1982) 572 F.Supp. 286, *aff'd* (6th Cir. 1983) 723 F.2d 1911 (intentional infliction of emotional distress); *Morris v. Owens-Illinois Insurance* (S.D. W.Va. 1982) 544 F.Supp. 752 (emotional distress claim); *Majors v. U.S. Air, Inc.* (D. Md. 1981) 525 F.Supp. 853 (false imprisonment and defamation); *Carson v. Southern Railway Co.* (D.S.C. 1979) 494 F.Supp. 1104 (defamation, accusation of drinking on duty); *DeTomaso v. Pan American World Airways, Inc.* (1987) 43 Cal.3d 517, 235 Cal.Rptr. 292, *cert. denied* 484 U.S. 829, 108 S.Ct. 100, 98 L.Ed.2d 60 (defamation and intentional infliction of emotional distress); *Miller v. United Airlines, Inc.* (1985) 174 Cal.App.3d 878, 220 Cal.Rptr. 684 (intentional infliction of emotional distress, defamation and invasion of privacy); *Pandil v. Illinois Central Gulf R.R.* (Iowa App. 1981) 312 N.W.2d 139 (wrongful denial of recall from furlough status).

These decisions hold that (1) employment disputes, such as wrongful termination suits, are preempted under the RLA; (2) the essential inquiry to be made by the court in determining the preemption question is whether the claim is inextricably intertwined with the grievance procedure set forth in the collective bargaining agreement; (3) characterizing the claim as one for common law tort or for violation of a state or federal statute is not the determining issue in deciding whether an action is preempted.

In fact, the courts have held that the RLA can preempt state statutes. See *McCall, supra*; *Samzcyk, supra*;

Stephens, supra. Furthermore, the mere fact that a plaintiff has alleged violation of a federal statute such as Title VII of the Civil Acts Rights of 1964 does not mandate that the claim should not be preempted.

In *Bernhardt, supra*, the plaintiff alleged a violation of his civil rights. Yet, the court noting the strong interest of the RLA in arbitrating disputes, as set forth in the United States Supreme Court decision of *Andrews, supra*, dismissed the plaintiff's complaint. The determining factor is whether the claim arises out of an employment dispute which is governed by the RLA, not whether it is called a violation of a state statute or even the violation of a federal statute. The plaintiff's instant complaint for "employment discrimination" is in fact such an employment dispute. As the statutory and case law clearly establish, such a claim is preempted under the RLA.

5. The Case Relied Upon By The California Court of Appeal Are Distinguishable.

In reversing the trial court's ruling, the California Court of Appeal relied on cases such as the *Colorado Anti-Discrimination Commission v. Continental Airlines, Inc.* (1963) 372 U.S. 714, 83 S.Ct. 1022, 10 L.Ed.2d 84 and *Coppinger v. Metro-North Commuter Railroad* (2d Cir. 1988) 861 F.2d 33. The court's reliance on these cases is misplaced.

In *Colorado Anti-Discrimination Commission, supra*, the Court was confronted with a situation in which the plaintiff alleged that he was *denied employment* by the defendant because of his race. The plaintiff filed a complaint under the Colorado Anti-Discrimination Act of 1957 which prohibited an employer from refusing to hire someone because of race. After an extensive hearing, the Colorado Anti-Discrimination Commission ruled that the defendant was guilty of

discriminatory practices. The Colorado Supreme Court set aside the commission's findings holding that the Anti-Discrimination Act could not cover personnel of an interstate air carrier because it would impose an undue burden on interstate commerce in violation of Article 1, Section 8, Clause 3 of the United States Constitution and because the action was preempted by the Railway Labor Act, the Civil Aeronautics Act of 1938 and Federal Executive Orders.

In making its ruling, the Court was confronted with a situation in which the plaintiff was *not yet employed* with the defendant airline and hence did not have access to the grievance and arbitration procedures of the RLA. While the Court stated that the RLA did not expressly impose upon an air carrier a duty to engage in non-discriminatory *hiring practices*, the court recognized that the RLA had previously been interpreted to prevent an employer from participating in discriminatory practices to current employees. See *Conley v. Gibson* (1957) 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80; *Brotherhood of Railroad Trainmen v. Howard* (1952) 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283; *Steele v. Louisville & Nashville Railroad Co.* (1944) 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173.

In relying on *Colorado Anti-Discrimination Commission*, the California Court of Appeal misinterpreted the scope of the Court's ruling, which should be limited to discrimination against *prospective employees*, and failed to take into account the later Supreme Court cases such as *Andrews, supra*, and *Sheehan, supra*, which have held that employment disputes between *employees* and employers are preempted under the RLA.

The California Court of Appeal also relied on the case of *Coppinger v. Metro-North Commuter Railroad* (2d Cir. 1988) 861 F.2d 33. In that case, the employee was terminated from his employment after a mandatory urinalysis

showed positive for the presence of THC (marijuana) in the employee's system. The employee filed an action for violation of his fourth amendment rights under 42 U.S.C. §1983. The district court granted the employer's motion to dismiss the complaint on the ground that the court lacked jurisdiction. On appeal, the United States Court of Appeal, Second Circuit ruled that the plaintiff had made a colorable fourth amendment violation allegation and that such an allegation was not preempted under the RLA.[1]

In the instant case, however, plaintiff is not making a claim under federal law for violation of his Fourth Amendment rights, where the basis for that claim is clearly delineated. The instant plaintiff is instead making a claim under a state statute, and that claim, as the undisputed facts reveal, is in essence an employee-employer dispute based on the termination of his employment for violating Rule G.

6. Allowing The California Court of Appeal's Decision to Stand Will Cripple The RLA.

In *Farmer v. Brotherhood of Carpenters Local 25* (1977) 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338, the Court created a two part balancing test to determine the scope of preemption:

> "By examining the state interests in regulating the conduct in question and *the potential for interference with the federal regulatory scheme.*" 430 U.S. at 297, 97 S.Ct. at 1061, 51 L.Ed.2d at 348. (Emphasis added.)

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[1]Section 1983 of the Civil Rights Act does not create or secure any substantive rights in itself but merely authorizes a civil action for alleged violations of constitutional rights. It is solely a procedural statute which has not in itself grant any substantive rights. *Garcia v. Wilson* (10th Cir. 1984) 731 F.2d 640 *aff'd* 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254.

Similarly, the Court in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters* (1978) 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209, recognized that the important issue regarding preemption was whether the state law to be preempted would interfere with the federal regulatory scheme. The Court stated:

> "The critical inquiry, therefore, is not whether the state is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been , but was not, presented to the labor board." 436 U.S. at 197, 98 S.Ct. at 1757, 56 L.Ed.2d at 225.

In *Jackson v. Consolidated Rail Corp., supra*, the court recognized that to allow a railroad employee to maintain a state action for retaliatory discharge would frustrate the RLA. As the court noted:

> "The claim raised by Jackson, pursuant to Indiana law, is identical to the claim he would have made, had he pursued the grievance through administrative channels, and therefore the potential interference with the federal regulatory interest is too great, under *Sears*, 436 U.S. at 197, 98 S.Ct. at 1757, to permit an exception to the preemption doctrine." 717 F.2d at 1054.

In the instant case, the gravaman of the plaintiff's complaint is his alleged wrongful discharge for violating rule G. Clearly, the issues regarding the propriety of that action which would be litigated in any state court action would be identical to the issues put forward in the grievance

procedures mandated by the RLA and the union agreement between plaintiff's union and SOUTHERN PACIFIC.

In *Gregory v. Burlington Northern Railroad Co.* (D. Minn. 1986) 638 F.Supp. 538, a former employee brought an action against the railroad company alleging wrongful discharge because he was discharged following the results of a drug test in which he tested positive. In ruling that the action was preempted, the court noted:

> "To permit railroad employees to initiate discharge disputes in the federal courts, thereby bypassing orderly arbitration procedures, *would frustrate congressional purpose* and would precipitate interruptions in the nation's transportation industry. Concern for stability is particularly important where drug testing of railroad employees is involved—given the public's reliance on the services of transportation carriers, substance abuse by employees in the industry raises a potentially grave threat to public safety and welfare. A drug testing policy designed to meet these concerns would be robbed of its efficacy if employees who tested positively were routinely permitted access to the federal courts." 638 F.Supp. at 547. (Emphasis added.)

The California Supreme Court stated in *DeTomaso:*

> "Like the United States Supreme Court, we believe that, if the policies underlying the RLA are to be given their proper force, the preemptive effect of the Act cannot be limited to suits alleging contract violations. If an employee can institute a civil action, in essence litigating the questions at issue in an arbitration, the value of arbitration as a dispute resolution tool will be undermined.

> Further, if the courts can be used as forums to resolve arbitrable disputes, employees can make an end run thereby avoiding the carefully crafted congressional procedures set forth in the RLA. These results cannot be squared with federal policy." 43 Cal.3d at 528, 235 Cal.Rptr. at 298-299. (Footnote omitted.)

In the instant case, to allow plaintiff to evade the arbitration provisions of the RLA by merely claiming the violation of a state statute, a generic employment discrimination claim based on race and/or physical handicap, would completely eviscerate the provisions of the RLA. Allowing the plaintiff's claim to proceed when the basis for the claim is indisputably based upon the plaintiff's employment termination for violating Rule G would unduly interfere with the federal regulatory scheme of the RLA.

The effect of the California Court of Appeal's decision is that form prevails over substance. Virtually any claim by a railroad employee can be characterized as a violation of some state statute. If the purpose of the mandatory arbitration scheme set by Congress in enacting the RLA is to allow for a swift determination of employer-employee disputes in a vital national industry, then that purpose will be nullified by the California Court of Appeal's decision. If a plaintiff, such as the plaintiff in the instant case, can make an "end run" around the arbitration provisions of the RLA by merely making a claim for employment discrimination when it is undisputed that the real basis for his complaint is employment termination, clearly a minor dispute under the numerous decisions of the state and federal courts in this country, then the RLA arbitration provisions will become meaningless. The intent of Congress must not be frustrated by allowing a plaintiff to evade provisions of the RLA by the mere ploy of alleging employment discrimination.

CONCLUSION

For all the foregoing reasons, petitioner SOUTHERN PACIFIC respectfully requests the Court to issue a Writ of Certiorari so as to reverse the decision of the California Court of Appeal, Second Appellate District and reinstate the judgment of the Los Angeles Superior Court that the instant action is preempted under 45 U.S.C. Section 151 et seq.

DATED: February 28, 1990

Respectfully submitted,

DONALD A. WAY
RICHARD E. RICO
BREIDENBACH, SWAINSTON, CRISPO & WAY

Attorneys for Petitioner
SOUTHERN PACIFIC
TRANSPORTATION COMPANY

APPENDIX

WILLIAM DAVID EVANS, Plaintiff,	)	CASE NO. C-514091
vs.	)	MINUTE ORDER
SOUTHERN PACIFIC TRANSPORTATION COMPANY, Defendant.	)	

Motion of defendant SOUTHERN PACIFIC TRANSPORTATION COMPANY for Summary Judgment or Summary Adjudication of Issues.

Matter is argued and taken under submission. Later, court makes the following ruling:

1. Motion for Summary Judgment is granted in favor of defendant SOUTHERN PACIFIC TRANSPORTATION COMPANY and against plaintiff. See DeTomaso v. Pan American World Airways, Inc., 43 Cal.3d 517, 528; Stephens v. Norfolk, etc., (1986) 792 F.2d 576, 580.

2. Moving party to prepare Order and give notice.

Minutes entered December 31, 1987.

Judge Warren Deering, Judge of the
Superior Court for the County
of Los Angeles

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

WILLIAM DAVID EVANS,	)	No. B033144
Plaintiff and	)	(Super.Ct.No. C-
Appellant,	)	514091)
v.	)	
SOUTHERN PACIFIC	)	
TRANSPORTATION COMPANY,	)	
Defendant and	)	
Respondent.	)	

COURT OF APPEAL - SECOND DIST.
FILED
SEP 15 1989
ROBERT N. WILSON Clerk
Deputy Clerk

APPEAL from a judgment and an order of the Superior Court of Los Angeles County. Warren H. Deering, Judge. Judgment reversed; appeal from order dismissed.

Fogel, Feldman, Ostrov, Ringler & Klevens and Richard L. Rosett for Plaintiff and Appellant.

Breidenbach, Swainston, Crispo & Way, Donald A. Way and Richard E. Rico for Defendant and Respondent.

Plaintiff, William Evans, appeals from summary judgment entered in favor of defendant, Southern Pacific Transportation Company, and against plaintiff in an employment discrimination action. Plaintiff also appeals from order denying his motion to tax costs.[1]

[1]The order is appealable. (Code Civ. Proc., § 904.1, subd. (b); Lacey v. Bertone (1949) 33 Cal.2d 649, 654; Jimenez v. City of Oxnard (1982) 134 Cal.App.3d 856, 858, fn. 3.)

FACTS

In June 1980, while employed by defendant as an electrician, plaintiff sustained personal injuries in the course of his employment. In April 1983 plaintiff commenced an action against defendant under the Federal Employers' Liability Act (FELA) (45 U.S.C. § 51 et seq.) seeking damages for his injuries. (L.A. Super. Ct. case No. C-448486.) In August 1983 plaintiff allegedly had the smell of alcohol on his breath while he was on defendant's premises in the performance of his duties. Pursuant to the collective bargaining agreement between defendant and the International Brotherhood of Electrical Workers (IBEW), of which plaintiff was a member, a hearing was held regarding plaintiff's alleged violation of Rule G which prohibits employees of railroads from possessing alcohol or being intoxicated while on duty.[2] As a result of the hearing defendant fired plaintiff in September 1983. Plaintiff, represented by the general chairman of the IBEW, appealed his dismissal. The appeal was denied and plaintiff remained dismissed until July 1985 when he was reinstated by defendant on a leniency basis.

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[2]The record does not include the text of Rule G. That regulation recently was described by the United States Supreme Court: "For many years, railroads have prohibited operating employees from possessing alcohol or being intoxicated while on duty, and from consuming alcoholic beverages while subject to being called for duty. More recently, these proscriptions have been expanded to forbid possession or use of certain drugs. These restrictions are embodied in 'Rule G' an industry-wide operating rule railroad in the country. The customary sanction for Rule G violations is dismissal." (Skinner v. Railway Labor Exec. Assn. (1989) ___U.S. ___, ___, 103 L.Ed.2d 639, 653, ___ S.Ct. ___.)

In September 1984, pursuant to the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), plaintiff sued defendant for employment discrimination. (L.A. Super. Ct. case No. C-514091.) The complaint, which sought damages and injunctive and declaratory relief, alleged that defendant discriminated against plaintiff by firing him because he is black and because he suffers from a physical handicap that resulted from the injuries he sustained in July 1980 due to defendant's negligence. On plaintiff's motion the personal injury action and the employment discrimination action were consolidated.

Defendant moved for summary judgment in the employment discrimination action on the ground said action is preempted by the federal Railway Labor Act (RLA) (45 U.S.C. § 151 et. seq.). The motion was granted and summary judgment was entered in favor of defendant and against plaintiff. Plaintiff moved to tax costs claimed by defendant. The motion was denied.

Plaintiff appeals from the judgment and from the order denying his motion to tax costs.

DISCUSSION

I

APPEAL FROM JUDGMENT

A

Summary judgment is proper only where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); Chong v. Fremont Indemnity Co. (1988) 202 Cal.App.3d 1097, 1100.) Inasmuch as the facts here are undisputed the sole issue presented, both in the trial court

and on appeal, is one of law. In reviewing a grant of summary judgment when the issue on appeal is one of law, the appellate court is not bound by the trial court's determination but is free to draw its own conclusions of law from the undisputed facts. (Milo Equipment Corp. v. Elsinore Valley Mun. Water Dist. (1988) 205 Cal.App.3d 1282, 1285; Cox Cable San Diego, Inc. v. City of San Diego (1987) 188 Cal.App.3d 952, 958.) If the trial court erred in applying the law to the facts the judgment must be reversed. (See Scroggs v. Coast Community College Dist. (1987) 193 Cal.App.3d 1399, 1401.)

B

In determining a question of preemption, "[t]he crucial inquiry is whether the exercise of the state authority 'frustate[s] effective implementation of [an] Act's processes.'" (New York Tel. Co. v.New York Labor Dept. (1979) 440 U.S. 519, 550 [59 L.Ed.2d 553, 574, 99 S.Ct. 1328], conc. opn. of Blackmun, J.) "[I]nflexible application of the [preemption] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." (Farmer v. Carpenters (1977) 430 U.S. 290, 302 [51 L.Ed.2d 338, 351, 97 S.Ct. 1056].) Courts are reluctant to infer preemption (Exxon Corp. v. Governor of Maryland (1978) 437 U.S. 117, 132 [57 L.Ed. 91, 104, 98 S.Ct. 2207]) and it is the burden of the party claiming that Congress intended to preempt state law to prove it. (Ellsworth v. Beech Aircraft Corp. (1984) 37 Cal.3d 540, 548.) "'. . . It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.' [Citation.]" (New York Dept. of Social Services

v. Dublino (1973) 413 U.S. 405, 413 [37 L.Ed.2d 688, 695, 93 S.Ct. 2507].)

The California FEHA establishes that freedom from job discrimination on specified grounds, including race and physical handicap, is a civil right (Gov. Code, § 12921); it declares that such discrimination is against public policy (id., § 12920) and is an unlawful employment practice (id., § 12940).[3] (Commodore Home Systems, Inc v. Superior Court (1982) 32 Cal.3d 211, 213.) "The policy that promotes the right to seek and hold employment free of prejudice is fundamental. Job discrimination 'foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general.' (§ 12920.) The statute's aim is to provide effective remedies against the evil." (Id., at p. 220; see also Brown v. Superior Court (1984) 37 Cal.3d 477, 485.)

Congress enacted the RLA in order to promote stability in the railroad industry and to provide for prompt and efficient resolution of labor-management disputes arising out of railroad collective bargaining agreements. (Lewy v. Southern Pacific Transp. Co. (9th Cir. 1986) 799 F.2d 1281, 1289.) The RLA provides a comprehensive framework for resolution of disputes in the railroad industry. All "disputes between . . . [railroad] employees

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[3]Government Code section 12940 provides: "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California [¶] (a) For an employer, because of the race . . . [or] physical handicap . . . of any person, to refuse to hire or employ the person . . . or to bar or to discharge the person from employment . . . or to discriminate against the person in compensation or in terms, conditions or privileges of employment. . . ."

and . . . carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" are minor disputes. (45 U.S.C. § 153, First (i); Lewy v. Southern Pacific Transp. Co., supra, 799 F.2d at p. 1289.) A discharge grievance, a minor dispute, is subject to the internal grievance process and if not settled, is submitted to the National Railroad Adjustment Board established under the RLA. (Andrews v. Louisville & Nashville R. Co. (1972) 406 U.S. 320, 322 [32 L.Ed.2d 95, 98, 92 S.Ct. 1562]; McAlester v. United Air Lines, Inc. (10th Cir. 1988) 851 F.2d 1249, 1252.)

While the RLA remedy for the resolution of minor disputes is "at least in some situations" exclusive (Andrews, supra, 406 U.S. at p. 325 [32 L.Ed.2d at p. 100]), the RLA "is not basically a fair employment practice act nor has it been utilized as such." (Norman v. Missouri Pacific R.R. (8th Cir. 1969) 414 F.2d 73, 82.) Accordingly the RLA does not preclude a court's jurisdiction over claims based on federal civil rights statutes (42 U.S.C. § 1981 et seq.). (Coppinger v. Metro-North Commuter R.R. (2d Cir. 1988)

861 F.2d 33; McAlester v. United Air Lines, Inc., supra, 851 F.2d 1249.)

In Coppinger v. Metro-North Commuter R.R., supra, 861 F.2d 33, the court reasoned that the plaintiff's statutory civil rights claim had an origin legally independent of his contractual right to pursue his grievance under the RLA and thus the arbitration of the grievance did not foreclose his civil rights action. In reaching this conclusion the court relied on the following language in Alexander v. Gardner-Denver Co. (1973) 415 U.S. 36, 49-50 [39 L.Ed.2d 147, 159, 94 S.Ct. 1011]: "In submitting his grievance to arbitration, an employee seeks to vindicate a contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII [of the Civil Rights Act of 1964], an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrences. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.'" (Coppinger, supra, 861 F.2d at p. 36.) The Coppinger court further noted that in Atchison, T. & S. F. Ry. Co. v. Buell (1987) 480 U.S. 557 [94 L.Ed.2d 563, 107 S.Ct. 1410], the Supreme Court held that the RLA's binding arbitration provisions did not deprive the district court of jurisdiction to hear an employee's claim against his employer for personal injuries arising under the FELA. The Supreme Court "noted that the RLA did not preempt other federal statutes that provide rights outside the scope of those covered by the RLA. Buell, 107 S.Ct. at 1415. Notwithstanding the deference normally accorded the RLA's arbitration system, the claimant could maintain a cause of action asserted under the FELA because '"different considerations apply where the employee's claim is based on

rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.'" [Buell, 480 U.S. at p. 565 [94 L.Ed.2d at p. 573.)" (Coppinger, supra, 861 F.2d at p. 37.) Coppinger concluded that for the reasons expressed in Buell the plaintiff's statutory civil rights claim (42 U.S.C. § 1983) was not foreclosed by his resort to the grievance procedure provided by the RLA.(Ibid.)

In McAlester v. United Air Lines, Inc., supra, 851 F.2d 1249, it was held that the RLA did not preempt a racially discriminatory discharge claim under a federal civil rights statute (42 U.S.C. § 1981). The court observed that the "RLA contains no language which could be remotely construed as directly repealing § 1981" (p. 1253) and added that it "[could] not conclude that these statutes are irreconcilable or that the RLA covers the subject matter of racial discrimination in contracting or was clearly intended as a substitute for § 1981." (P. 1254.)

While Coppinger and McAlester admittedly considered the RLA's preemption of federal, not state, statutes securing basic civil rights, there appears to be no reason why the rationale of those cases does not apply equally to California's FEHA. In his employment discrimination action plaintiff asserts a statutory right independent of the contractual right, under the collective bargaining agreement and the RLA, to challenge his dismissal. The RLA does not purport to cover claims of racial discrimination in the dismissal of railroad employees and does not expressly preempt either federal or state statutes proscribing such dismissal.

In Colorado Anti-Discrimination Com. v. Continental Air Lines, Inc. (1953) 372 U.S. 714 [10 L.Ed.2d 84, 83 S.Ct. 1022] the United States Supreme Court held that the RLA does not bar enforcement of Colorado's anti-

discrimination law which, like California's FEHA, provides that it is an unfair employment practice for an employer "to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against, any person otherwise qualified, because of race, creed, color, national origin or ancestry." (372 U.S. at p. 716 [10 L.Ed. at p. 87].) The court stated: "There is even less reason to say that Congress, in passing the Railway Labor act and making certain of its provisions applicable to air carriers, intended to bar States from protecting employees against racial discrimination. No provision in the Act even mentions discrimination in hiring. . . . Nothing in the Railway Labor act or in our cases suggests that the Act places upon an air carrier a duty to engage only in fair nondiscriminatory hiring practices. The Act has never been used for that purpose, and we cannot hold it bars Colorado's Anti-Discrimination Act." (Colorado Anti-Discrimination Com., supra , 372 U.S. at p. 724 [10 L.Ed.2d at p. 91], fn. omitted.)

In McCall v. Chesapeak & Ohio Ry. Co. (6th Cir. 1988) 844 F.2d 294 (cert. den. (1988) ___U.S. ___, 102 L.Ed.2d 166, ___ S.Ct. ___), for purposes of determining preemption by the RLA a distinction was drawn between a state statute prohibiting racial discrimination and a state statute prohibiting discrimination on account of physical handicap (the Michigan Handicappers' Civil Rights Act). The court determined that while racial discrimination is "conduct that is not by any construction a subject for collective bargaining and arbitration," the state handicappers' act stands on different footing. (McCall, supra, 844 F.2d at p. 302.) Said the court: "In the case of a statute barring racial discrimination, the only inquiry made is whether the motivation for the challenged action was the employee's race. In the case of the Handicappers' Act, the inquiry must go further: once it is established that the challenged action

was taken on account of the employee's physical condition, it must also be determined that the employee's physical condition is unrelated to job performance. It is the necessity of the second level of inquiry which leads to our conclusion that the state claim is preempted in this case. The parties in this case committed the determination of whether a particular physical condition affects an individual's ability to perform the duties of an engineer or fireman to the arbitration process. [Citation.] The inquiry made by the arbitration board—whether McCall's insulin-requiring diabetic condition allows him to perform the duties of an engineer or fireman—is the same factual inquiry made by the jury in McCall's Handicappers' Act suit. . . . [¶] . . . There is not merely a risk of infringement on an area of primary federal concern in this case, there is a direct conflict. Therefore, the state claim is preempted." (Id., at pp. 302-303; but see Muncy v. Norfolk & Western Ry Co. (S.D.W.Va. 1986) 650 F.Supp. 641.)

Unlike the situation in McCall, plaintiff was not discharged because his physical handicap rendered him unfit to perform the duties of his job, but because he was found to have violated Rule G. However, the distinction is irrelevant for purposes of determining the RLA's preemption of a state cause of action. Inherent in the present action is a claim that plaintiff's alleged handicap did not prevent performance of the duties of his job. If an employee's lack of fitness to perform his job is made arbitrable under the parties' collective bargaining agreement, the present action is preempted insofar as it alleges discrimination based on physical handicap because it raises an issue determinable solely under procedures established by the RLA. "[W]hen an arbitration board established pursuant to [the RLA] is required by the collective bargaining agreement to make the same factual inquiry regarding physical ability to perform a

job as would be made under the state act, the federal dispute resolution process is the sole remedy.' (McCall v. Chesapeak & Ohio Ry. Co., supra, 844 F.2d 294, 303.)

The principle of preemption by the RLA of matters governed by a collective bargaining agreement was applied in DeTomaso v Pan American World Airways, Inc. (1987) 43 Cal.3d 517. There, an airline employee discharged for "fraud, dishonesty and abuse of company policy" sued his former employer for damages for defamation and negligent and intentional infliction of emotional distress which were committed during the employer's investigation of the charges against the employee and the discharge procedures mandated by the collective bargaining agreement. The Supreme Court held the employee's claims for defamation and infliction of emotional distress were preempted by the RLA stating: "RLA preemption must . . . extend to any claim premised on facts inextricably intertwined with matters subject to the grievance procedures of the collective bargaining agreement. To adjudicate such issues would necessarily involve interpretation of the agreement, which a court is without jurisdiction to do." (DeTomaso, supra, 43 Cal.3d at p. 529.)

In DeTomaso the Supreme Court cited Stephens v. Norfolk & W. Ry. Co. (6th Cir. 1986) 792 F.2d 576 (mod. 811 F.2d 286) as an example of an action preempted by the RLA because the conduct underlying the action was "'arguably governed by' or has a 'not obviously insubstantial relationship to' or has a 'not obviously insubstantial relationship to' the collective bargaining agreement.' (DeTomaso v. Pan American World Airways, Inc., supra, 43 Cal.3d at pp. 527-528.) In Stephens it was held that the RLA preempted an action for violation of a state statute prohibiting discrimination based on a physical handicap unrelated to the worker's ability to perform the

duties of his job. The court noted that the collective bargaining agreement covered aspects of the work relationship including defendant employer's prerogative for setting physical qualifications for employees, and that defendant legitimately exercised rights granted by the collective bargaining agreement in disqualifying plaintiff. "Any disagreement with [defendant's] decision necessarily implies interpretation and application of the collective bargaining agreement. Consequently, [plaintiff's] complaint constitutes a minor dispute subject to primary and exclusive jurisdiction of the NRAB. [Plaintiff] availed himself of the contractual grievance procedures culminating in a hearing before Public Law Board No. 912. His current civil rights allegations present a matrix of facts 'inextricably intertwined,' with the contract grievance proceeding and the RLA." (Stephens v. Norfolk & W. Ry. Co., supra, 792 F.2d at p. 581.)

The same cannot be said in the present case. In support of its motion for summary judgment defendant submitted portions of the collective bargaining agreement between defendant and plaintiff's union. Those portions did not mention an employee's lack of physical fitness to perform his job as a ground for his discharge, much less commit to the arbitration process the determination of whether a particular physical condition affects an individual's ability to perform the duties of his job. A party moving for summary judgment bears the burden of furnishing supporting documents that establish that the claims of the adverse party are entirely without merit on any legal theory and that the moving party is entitled to judgment as a matter of law. (Mann v. Cracchiolo (1985) 38 Cal.3d 18, 35; Jones v. Los Angeles Community College Dist. (1988) 198 Cal.App.3d 794, 812-813.) Defendant did not sustain that burden inasmuch as the papers it submitted failed to establish that

plaintiff's cause of action for employment discrimination based on physical handicap is "inextricably intertwined" with matters subject to the contractual grievance procedure set forth in the collective bargaining agreement.

The RLA does not preempt plaintiff's action for employment discrimination on the ground of either race or physical handicap. Accordingly, the summary judgment entered in that action must be reversed.

II

APPEAL FROM ORDER DENYING MOTION TO TAX COSTS

Because the award of costs to defendant was incident to the judgment, reversal of the judgment operates to vacate the award. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 625, p. 607.) Accordingly, plaintiff's appeal from the order denying his motion to tax costs is moot and the appeal therefrom must be dismissed.

DISPOSITION

The judgment is reversed. The appeal from the order denying plaintiff's motion to tax costs is dismissed. Costs on appeal are awarded to plaintiff.

CERTIFIED FOR PUBLICATION

LILLIE, P.J.

I concur:

JOHNSON, J.

CERTIFIED FOR PUBLICATION

WOODS (Fred), J.

In concur in the judgment under the compulsion of Alexander v. Gardner-Denver Co. (1974) 415 U.S. 36. Colorado Anti-Discrimination Comm'n v. Cont'l Air Lines (1963) 372 U.S. 714 and Coppinger v. Metro-North Commuter R.R. (2nd Cir. 1988) 861 F.2d 33.

I respectfully express concern with existing law in that the arbitration process provided for under the Railway Labor Act of 1926 and as amended in 1934 is rendered virtually transitory in cases of mixed or non-generic discrimination claims like the one in this instance. Under existing law, an employee who is fired for cause and loses the arbitration of his grievance dispute under the Railway Labor Act, can thumb his nose at the award, at the doctrines of collateral estoppel and res judicata, and proceed de novo not only on his "termination for cause" decision, but on an independent action in the state court based upon a claim of discrimination, whether or not he deigned it appropriate to submit his discrimination claim to the arbitration process.

Prompt relief intended to be provided for by the arbitration provisions of the Railway Labor act, under such a state of affairs, is transitory indeed.

CERTIFIED FOR PUBLICATION.

WOODS (Fred), J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Second Appellate District, Division Two, No. B033144-S012588

In the Supreme Court of the State of California

IN BANK

EVANS,

Appellant

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Respondent

Respondent's petition for review DENIED.

RECEIVED
DEC 4 - 1989
GREIDENBACH, SWAINSTON, CRISPO & WAY

SUPREME COURT
FILED
NOV 30 1989
... Clerk
Deputy

LUCAS

Chief Justice

APPENDIX C

PROOF OF SERVICE LIST

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on March 1, 1990, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, by Express Mail, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(By Express Mail: original and forty copies)

Honorable Warren Deering
Los Angeles Superior Court
Central District
111 North Hill Street
Los Angeles, California 90012

The Supreme Court of the State of California
3580 Wilshire Boulevard
Room 213
Los Angeles, California 90010

Richard L. Rosett, Esq.
Fogel, Feldman, Ostrov, Ringler & Klevens
5900 Wilshire Boulevard
Suite 2600
Los Angeles, California 90036
(3 copies)

California Court of Appeal
Second Appellate District
Division 7
3580 Wilshire Boulevard
Room 301
Los Angeles, California 90010

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 1, 1990, at Los Angeles, California.

Betty J. Malloy

(Original signed)